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BEFORE THE

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COMPUTER RESERVATIONS SYSTEM (CRS) REGULATIONS, NOTICE NO. 97-9))))	Docket No. OST-97-2881 -34

COMMENTS OF AMERICAN TRANS AIR, INC.

Communications with respect to this document should be sent to:

Brian T. Hunt, Esq. Vice President and General Counsel AMERICAN TRANS AIR, INC. 7337 West Washington Street P.O. Box 51609 Indianapolis, IN 46251 (317) 240-7006

Marshall S. Sinick James V. Dick SQUIRE, SANDERS & DEMPSEY, LLP 1201 Pennsylvania Avenue, NW Washington, D.C. 20004 (202) 626-6600

Counsel for American Trans Air, Inc.

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BEFORE THE UNITED STATES DEPARTMENT OF TRANSPORTATION WASHINGTON, D.C.

COMPUTER RESERVATIONS SYSTEM (CRS) REGULATIONS, NOTICE NO. 97-9		Docket No. OST-97-2881
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COMMENTS OF AMERICAN TRANS AIR, INC.

American Trans Air, Inc. ("ATA") submits these comments to the United States Department of Transportation (the "Department" or "DOT") in response to the Department's September 10, 1997 Advance Notice of Proposed Rulemaking ("ANPRM") concerning the Computer Reservations System ("CRS") Rules, 14 C.F.R. Part 255. 62 Federal Register 47606 (Sept. 10, 1997).

The current CRS Rules have proven necessary to protect non-vendor, participating carriers like ATA from some of the most significant abuses by the major CRSs, <u>e.g.</u>, blatant display bias. They have been generally ineffective, however, in checking the unconstrained ability of the CRSs to raise booking fees, to charge participating carriers for transactions that provide no value whatever, and in general to inflate participating carriers' CRS distribution costs to the point where it is difficult to remain competitive in the air transportation market. In these comments, ATA strongly recommends that the current CRS Rules be readopted, but with certain

modifications designed to temper the market inequality between the major CRSs and non-vendor participating carriers.

I. THE EXISTING CRS RULES PROVIDE INSUFFICIENT PROTECTION FOR PARTICIPATING CARRIERS

From the perspective of a non-vendor, participating carrier like ATA, the existing CRS Rules have provided insufficient protection from escalating and inflated CRS charges and other arbitrary actions by CRSs. Booking fees continue to escalate rapidly. When ATA began to subscribe to Sabre in March 1993, for example, the booking fee at the "full participation" level was \$2.25; it is currently \$2.65, an increase of 18%, even before counting the additional new charge of 12 cents for each cancellation. During this same period of time, the Information Processing Equipment Index ("IPEI") actually decreased by 39.6%. And Sabre is now rumored to be on the verge of announcing yet another price increase for 1998 of 6 to 8%.

Not only have booking fees spiraled upward, but CRSs continue to charge participating carriers substantial amounts for purported "bookings" which provide no value or benefit whatever to participating carriers. When ATA started to audit its CRS bills in 1995, it found that more than 7% of its charges were for such transactions. ATA has been overcharged more than a million dollars for improper and valueless transactions, such as: passive bookings on non-existent ATA flights; passive group bookings that ATA could not match to any actual reservations in its internal reservations system; duplicate bookings, including charges for multiple reservations by the same travel agent for the same passenger

¹Source: U.S. Department of Labor, Bureau of Labor Statistics, Consumer Prices and Price Indexes Division. The IPEC covers computer hardware, computer software, telecommunications, and other related industries in the information processing segment of the economy. The percentage decrease stated in the text is for the period March 1993 through October 1997.

on the same direct flight; speculative bookings and bookings for "passengers" with fictitious names; passive bookings by non-ARC and non-IATA agents; and bookings for classes of service that ATA does not offer and for which it will not accept tickets.

Attempts to negotiate credits for these types of unjustified charges with the CRSs have been futile. Under the unilaterally-adopted credit policies of the major CRSs, ATA has been offered pennies for each dollar of claimed credits and advised to seek a remedy directly against travel agencies for the balance.²

As a practical matter, CRSs do not have to negotiate with participating carriers in good faith, as sellers must do with regard to their buyers in virtually all other industries, because participating carriers are a captive audience. As the Department has recognized, participating carriers cannot afford to sever their CRS links to the subscriber agencies of any of the major CRSs. See, e.g., 62 Federal Register 59784-85 (Nov. 5, 1997). Non-vendor, participating carriers like ATA therefore have little or no negotiating leverage over the CRSs. They are effectively compelled to sign standard form Participating Carrier Agreements ("PCAs") that are drafted by the CRSs and offer little protection to participating carriers. On the few occasions when ATA has expressed its intention to refuse to pay for blatant overcharges, it has been threatened with the termination of its CRS participation.³

² ATA has in fact vigorously pursued remedial action directly against travel agencies but, as discussed in Section II-A below, such remedies are inherently limited.

³ Sabre has threatened to terminate ATA's PCA with Sabre at least twice. As the Department may be aware, ATA filed a declaratory judgment action against American and Sabre in June 1996. American Trans Air, Inc. v. American Airlines, Inc., et al., Civ. No. 1P96-0824C (S.D. Ind., filed 6/7/96). Cross-motions for summary judgment regarding, inter alia, the definition of "booking" in the Sabre PCA have been filed and briefed but not yet argued as of this writing. Discovery has been stayed pending a ruling on the cross-motions.

Absent assistance from the Department, it is inevitable that smaller carriers like ATA will continue to be forced to accept whatever arbitrary terms are imposed by the CRSs.

II. PROPOSED MODIFICATIONS OF THE CRS RULES

In order to alleviate the most serious consequences of the bargaining inequality between CRSs and non-vendor participating carriers, ATA urges DOT to reissue the current CRS Rules with the modifications proposed herein. Two of these modifications are similar to those proposed by America West Airlines, Inc. ("America West") in its Petition for Rulemaking (filed October 14, 1997). With minor revisions, ATA fully endorses the proposals made by America West.

A. Prohibit Productivity Pricing Provisions in Subscriber Contracts

The current CRS Rules prohibit "minimum use" clauses in the standard contracts between CRSs and their travel agent subscribers ("Subscriber Contracts"). 14 C.F.R. § 255.8(b). These clauses, which were quite common before 1992, required CRS subscribers to use the vendor's CRS for a certain number or percentage of transactions each month, under penalty of severe financial consequences and/or forfeiture of the equipment. In adopting the current rules in 1992, however, the Department decided against prohibiting so-called "productivity pricing" provisions in Subscriber Contracts, notwithstanding the recommendations of some commenters to forbid them. 57 Federal Register 43780, at 43826-27 (Sept. 22, 1992). It is now time for DOT to revisit its 1992 decision, and to prohibit further enforcement of productivity pricing provisions.

Productivity pricing clauses are the carrot to the minimum use clauses' stick. They enable travel agents to reduce their monthly CRS costs (or even to receive cash or credit back from the CRS) depending on the amount by which they meet or exceed their monthly booking quotas. Just like the now-prohibited minimum use clauses, they encourage travel

agents to inflate their average monthly bookings. As a matter of practice, agents receive productivity credits not only for making <u>bona fide</u> reservations, but also for making <u>passive</u> bookings, duplicate bookings, speculative bookings, and other types of non-productive "bookings".

The potential for productivity pricing clauses based upon monthly bookings to lead to inflated and valueless transactions is well-recognized by objective sources in the industry and is confirmed by ATA's own experience. See, e.g., Study on CRS Charging Principles for European Commission (Draft Report by SH&E), June 1995, at 10, 57-58. When ATA announced in January 1997 that it could be compelled to issue debit memos for defined categories of unacceptable bookings, including most passive bookings, travel agents made it clear to ATA that they believed they were absolutely entitled to make non-productive CRS bookings in order to reach their productivity goals, notwithstanding the unnecessarily inflated charges incurred by ATA. One travel agent communication received by ATA, for example, stated frankly that "[e]ach CRT must have a set amount of credits per month and it has been BK and GK [passive] segments that have helped reach that total." A November 7, 1997, comment by a travel agency in DOT Docket No. 49812, is also typical. In that comment, the owner of a Travel Agents International office noted that:

The passive segment provision of the [CRS subscriber] contract has now come under attack by the airlines, who threaten to issue debit memos for the use of passive segments.

Letter from Karen M. Krueger, Owner/Manager, Issaquah, Washington office of Travel Agents International, to DOT, 11/7/97 (Docket No. 49812). (Exhibit A hereto). She continued:

Yet the contract provides us with that [passive segment] capability so that we can meet the productivity requirements of the [subscriber] contract.

<u>Id</u>. (Emphasis added). Obviously not all travel agencies engage in abusive booking practices in order to reach their productivity goals. The reality, however, is that they not only have an incentive to do so, but their Subscriber Contracts specifically permit them to use, <u>e.g.</u>, passive bookings in order to perform such back office functions as invoicing and recordkeeping which are for the agents' benefit and for which participating carriers should not have to pay.⁴

Self-help on the part of participating carriers is a limited option at best. As noted above, ATA advised travel agents in January 1997 that certain specified booking practices were considered unacceptable to ATA, and that ATA would consider issuing debit memos in the future for bookings in those categories.⁵ ATA also amended its ARC Reporting Agreement with travel agents accordingly in order to eliminate any uncertainty as to the propriety of the debit memos. Travel agents have overwhelmingly opposed this procedure, believing (with some justification) that they are caught in the middle of the CRSs' "contractual blessing" of these practices for productivity purposes and ATA's prohibition. While the percentage of unacceptable bookings has decreased slightly since January, travel agency resistance has been sufficiently great that ATA has still not attempted to issue debit memos rather than non-

⁴The harm caused by productivity pricing provisions is not limited to the encouragement of non-productive bookings. Like many of the other former terms and provisions in CRS Subscriber Contracts that are prohibited by the current CRS Rules, productivity pricing provisions have a strong tendency to lock travel agents into the use of a single CRS by inhibiting their use of alternative channels (e.g., other CRSs, direct links to carriers, and the Internet) for which they "forfeit" their productivity credits. If productivity pricing provisions were barred, travel agents would have no economic incentive to favor their principal CRS over channels which may by-pass CRSs altogether. Barring such provisions would thereby help to foster the development and use of multiple or alternative channels of communication between travel agents and participating carriers, which, as the Department recognizes, represents the most realistic hope for bringing competitive discipline to the CRS/participating carrier market. See, e.g., 57 Federal Register 43780, 43781 (Sept. 22, 1992).

⁵ The prohibited booking practices specified by ATA include fictitious and speculative PNRs, duplicate bookings, and passive bookings used for any purpose other than issuing tickets for reservations that had been booked directly with ATA.

chargeable summaries of non-productive bookings. Enforcement of this policy against non-ARC agents is virtually impossible, moreover, because they are unaffected by the amendment to the ARC Reporting Agreement.

Similarly, the various products that CRSs have developed in recent years purportedly to help participating carriers control their CRS cost have limited utility. Some CRSs have developed products to block travel agents from making reservations on flights with flight numbers or on routes that are not operated by the participating carrier. But these enhancements may be circumvented with a few keystrokes, and they do not even attempt to address more significant types of abusive bookings. Most of the major CRSs also offer products that allow participating carriers to contemporaneously identify passive bookings. These products, when coupled with additional products available from third party suppliers, at least enable participating carriers to query travel agent subscribers before questionable transactions are billed. Participating carriers have no ability to prevent travel agents from actually entering unacceptable bookings, however, and, at least in transaction-based CRSs, carriers are charged a separate fee even if a queried transaction is cancelled. Attempts to seek financial recourse, moreover, are expensive and generally ineffective, and virtually impossible with regard to non-ARC or non-IATA subscribers.

As long as travel agents continue to receive productivity credits for non-productive bookings, they will have a strong incentive to make them; and as long as CRSs continue to receive booking fees for such transactions, they will have an incentive to permit them. ATA

consequently recommends that DOT adopt a rule prohibiting the use of productivity pricing provisions in Subscriber Contracts.⁶

B. <u>Limit the Type of Transactions For Which Booking Fees May Be Charged</u>

In its Petition for Rulemaking, filed in October 1997, America West proposes, inter alia, that the CRS transactions for which booking fees may be charged to participating carriers should be limited by rule to bookings that result in actual passenger travel. ATA strongly endorses the concept of limiting, by Departmental rule, the types of transactions for which booking fees may be charged. The America West proposal, if adopted, would help reduce the substantial number of non-productive transactions that yield no benefit to participating carriers but for which the participating carriers are expected to pay ever-escalating fees. Given the dramatic fee increases in recent years, participating carriers simply cannot afford to pay exorbitant fees for transactions that provide them no value whatever. The type of limitation proposed by America West helps to ensure that participating carriers will receive value for their CRS payments. This proposal may not substantially alter the noncompetitive nature of the CRS/participating carrier market, nor would it necessarily restrict the CRS's ability to escalate prices for chargeable transactions in order to offset their inability to charge for others. Unless and until the market structure becomes truly competitive, however, some limit on chargeable

As a "second best" alternative, DOT could bar productivity pricing provisions based upon bookings entered per month but not productivity pricing provisions based upon tickets issued per month. Such a rule would retain any alleged benefits of the productivity pricing concept while at least eliminating travel agents' incentive to inflate their monthly volume of non-productive bookings. This practice has been endorsed by the European Commission, see, e.g., Aviation Daily, 5/10/96, at 243, and apparently has been adopted by Amadeus in some geographic areas. This alternative, however, would not mitigate the disincentives to the use of alternative channels of access that are created by these clauses. See note 4 supra.

⁷ As noted above, it is ATA's understanding that Sabre plans to increase booking fees in 1998 by approximately 6 to 8%.

transactions is necessary because participating carriers lack the market leverage to control their growing CRS expenditures.

While ATA strongly endorses the concept of limiting the types of transactions for which fees may be charged, it believes that tying permissible charges to actual travel, as America West proposes, may prove unwieldy. It would be impossible to determine at the time a transaction occurs whether it is ultimately chargeable or not; months could pass before it is known whether the passenger actually travelled. The lag time between a transaction and a charge could easily lead to accounting and auditing difficulties on both sides. ATA believes it would be less cumbersome to tie the charges to the issuance (and reporting) of tickets on participating carriers' flights. In other words, CRSs could impose a charge for only one type of transaction, the issuance (and reporting) of a ticket. This modification of America West's proposal would preserve the concept that participating carriers should receive value in return for booking fees, but it would not unduly complicate the accounting or auditing process, as America West's proposal may have the potential to do.

C. Enable Participating Carriers to Decide for Themselves Whether CRSs May Offer Passive Booking Functionality for Their Flights

America West's Petition for Rulemaking also proposes that participating carriers should have the option of advising CRSs whether or not they will accept passive bookings and, if not, of instructing the CRSs to prevent travel agents from using a chargeable passive booking functionality. ATA strongly endorses this proposal. Like the limitation on chargeable transactions discussed above, it may not fundamentally remedy the noncompetitive structure of the CRS/participating carrier market, but it is the most effective and equitable means of avoiding the misuse and abuse associated with passive bookings in the absence of a competitive market structure.

Passive bookings (including passive bookings by non-ARC agents) represent the largest category of contested charges for ATA. ATA has circulated to travel agents its guidelines for the appropriate and inappropriate use of passive bookings (among other categories). It has not yet started to issue debit memos for bookings made in violation of the guidelines, but it is issuing "non-productive booking summaries" advising travel agents of the quantity and value of their unacceptable passive (and other) bookings each month. These efforts, however, are expensive, difficult to implement and to enforce, and cannot effectively reach the non-ARC agents with whom ATA has no formalized legal relationship. By contrast, it is ATA's understanding that it is a relatively simple matter for CRSs to configure their systems so that passive bookings on carriers which elected not to accept passives would be blocked at the source.

Indeed, ATA suggests that participating carriers should have the ability to establish the parameters of other transactions they will or will not accept as well, such as duplicative and speculative bookings as defined by the carriers. Barring technical impediments, there is no reason why participating carriers like ATA should not be able to determine for themselves what types of bookings they will and will not accept, and to require the CRSs to honor these decisions. This approach avoids the need for Department micromanagement by effectively "unbundling" the services offered to participating carriers. Participating carriers would pay for and receive only those services which they determine to have value for them.⁸

⁸The new parity clause rule embodies the analogous concept that participating carriers should decide for themselves which participation levels and enhancements are most appropriate for their operations and marketing strategies. See 14 C.F.R. § 255.6(e).

D. <u>Establish Dispute Resolution Mechanisms</u>

Adoption of the proposals discussed above should significantly reduce the pervasive and extensive disputes between CRSs and participating carriers over CRS billing issues. Regardless of whether these proposals are adopted or not, however, a need will undoubtedly remain for more effective dispute resolution mechanisms. As discussed above, ATA's attempts to resolve disputed booking fees with each CRS on a bilateral basis have met with relatively little success. Ultimately, a CRS's threat to expel a participating carrier from its system is sufficiently coercive to compel most participating carriers to settle their claims on the CRS's terms.

In order to facilitate the resolution of disputed billings on more equitable terms,

ATA proposes that DOT adopt the following requirements:

1. Participating Carrier Claims Should be Processed and Resolved Within a Reasonable and Fixed Period of Time

At present, CRSs have little incentive to resolve or even process claims for credits or refunds by participating carriers, for the CRSs are typically in possession of the fees paid for disputed charges. ATA has experienced lengthy and unjustified delays — up to one year or more — in each CRS's consideration of its claims. ATA therefore proposes that the Department adopt a rule requiring CRSs to consider and resolve claims by participating carriers within a reasonable and fixed period of time. Subject to further comment, we believe that a three-month period following the submission of a claim should be sufficient.

2. <u>Unresolved Disputes Should be Arbitrated</u>

If a CRS and participating carrier cannot resolve their dispute within a reasonable and fixed period of time (e.g., three months), they should be required by rule to submit the dispute to arbitration. The Department itself need not and should not be the arbitral authority.

Rather, it should require arbitration by an independent arbitor selected by the parties and/or a recognized arbitration authority such as the American Arbitration Association or the International Chamber of Commerce.

3. DOT Should be Notified Well Before Any Participating Carrier Is Terminated for Nonpayment of CRS Booking Fees

ATA also proposes that no CRS should be permitted to terminate a participating carrier due to nonpayment or partial payment of disputed charges for a period of at least four weeks after the CRS has notified the Department (and the carrier) of its intent to terminate the carrier. This prohibition would provide some necessary breathing space for the participating carrier and enable the parties, with the Department's assistance, to explore alternative courses of action. A similar provision is contained in the new parity clause rule, which provides that CRSs notify the Department at least two weeks prior to an intended termination for an alleged violation of a parity clause. 14 C.F.R. § 255.6(e). Such notice is no less justified in the context of billing disputes.

III. CONCLUSION

For the reasons set forth above, ATA respectfully submits that the Department should incorporate the proposals discussed herein in its new CRS Rules.

Of Counsel:

Brian T. Hunt, Esq. Vice President and General Counsel AMERICAN TRANS AIR, INC. 7337 West Washington Street P.O. Box 51609 Indianapolis, IN 46251 (317) 240-7006 Respectfully submitted,

Marshall S. Sinick James V. Dick

SQUIRE, SANDERS & DEMPSEY, LLP 1201 Pennsylvania Avenue, NW Washington, D.C. 20004

lay WI Strink

(202) 626-6600

Counsel for American Trans Air, Inc.



EXHIBIT A

November 7, 1997

Department of Transportation Room PL-401 400 Seventh St. SW Washington, D.C. 20590

Re: Docket 49812

SOT ME HUS

Enclosed you will find my recent correspondence with System One Amadeus, the CRS with whom our agency currently has a contract. This contract is five years in duration, and will expire in August, 2000. So we are about half way through the contract. The passive segment provision of the contract has now come under attack by the airlines, who threaten to issue debit memos for the use of passive segments. Yet the contract provides us with that capability so that we can meet the productivity requirements of the contract. Ldid not sign an automation contract that would incur debit memos from the airlines. Therefore, either the airlines must be prohibited from issuing debit memos for the proper performance of the contract, or System One Amadeus must amend the current contract so that debit memos are not incurred.

As you are gathering comments and suggestions for the CRS rules that will soon expire, I request that this problem be investigated and resolved, as if affects every retail travel business that has a contract with any of the CRS companies.

I would appreciate a response to this problem.

Sincerely,

Karen M. Krueger, CTC

Owner/Manager